(13)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 319

WILLIAM DAVIES CO., INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

LEWIS F. JACOBSON,
DAVID SILBERT,
33 N. LaSalle St.,
Chicago, Ill.,
Counsel for Petitioner.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On December 15, 1941 the National Labor Relations Board entered an order, (B.A. 319-340)[1] finding that the petitioner was guilty of unfair labor practices in violation of Section 8 (1) and 8 (3) of the National Labor Relations Act. 29 U.S.C.A. Sec. 158 (1 and 3).

[1] References are as follows: "B.A." refers to Board's Appendix; "R.A." refers to Respondent's Appendix.

This order was entered upon a charge filed with the Board by the United Packinghouse Workers of America, affiliated with Packinghouse Workers Organizing Committee, affiliated with the Congress of Industrial Organizations, hereinafter referred to as the "Union", (B.A. 6), a complaint filed by the Board (B.A. 7), an answer of the Petitioner (B.A. 11), a hearing and intermediate report by the Trial Examiner (B.A. 16), objections filed by the Petitioner, and oral arguments before the Board.

The Board ordered the Petitioner to cease and desist from discouraging membership in the Union, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to hire and tenure of employment, or any term or condition of employment of its employees; to cease and desist from in any manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization; to take affirmative action by offering James McNally, James Allen, Michael Moriarity and John Canning full reinstatement to their former or substantially equivalent positions.

On September 24, 1942 a Petition to enforce this order was filed with the United States Circuit Court of Appeals, for the Seventh Circuit, which on June 7, 1943 entered a decree enforcing the order, except with respect to the reinstatement of Michael Moriarity and James Allen, concerning which the court held there was no substantial evidence of discrimination in their discharge.

The Court of Appeals in its opinion (135 Fed. (2d) 181) said:

> "While the circumstances are not numerous or particularly flagrant, yet they do indicate a purpose to interfere with the exclusive right of the employees to engage in organizational activities, for the purpose of collective bargaining, as guaranteed by the Act.

It seems to be necessary to emphasize again that the question of organization by the employees, for the purpose of collective bargaining is the exclusive business and concern of the employees. It is the mandate of the statute that the employer shall not intrude himself into the picture."

The Court of Appeals applied the foregoing reasoning to the following state of facts:

Petitioner, WILLIAM DAVIES CO. INC. is an Illinois corporation, with its principal office and place of business in Chicago, Illinois. It operates plants in Chicago, Illinois and Toronto, Canada, where it is engaged in the processing, sale and distribution of meat products. In the fiscal year ending April 1, 1940 the Petitioner processed approximately 25 Million pounds (B.A. 7).

The Petitioner, in all the years of its existence, enjoyed a background of pleasant and harmonious relationship with its employees and at no time had it been involved in any labor controversy. The Board did not find that there was any background of anti-union activity upon the part of the Petitioner, and the Court of Appeals in its opinion specifically found that the Petitioner had no background of anti-union activity. It was under contract with the engineers' union, covering its engineers; the chauffeurs' union, covering its truck drivers; and the maintenance and electrical workers union, covering its maintenance employees (R.A. 162).

The union never demanded collective bargaining on behalf of Petitioner's employees, nor did the union ever petition the Board for certification as the collective bargaining agent (R.A. 90). Except for the union, no other labor organization, independent or affiliated, ever attempted the organization of its employees, so that no question of discrimination between this and other unions is involved.

There is no finding by the Board contrary to the foregoing facts, and the evidence is undisputed concerning the same, as well as the clear record of Petitioner with respect to lack of threats or interference by the company in the union campaign, except for the alleged specific instances found by the Board on which it bases its order.

The facts found by the Board are as follows:[2]

1. Alleged Coercive Statements (B.A. 322).

During the summer of 1939, Petitioner's employees began to talk about labor organization. However, steps to form an organization at the petitioner's plant were not taken until December. On December 15, 1939, Michael Moriarity, an employee, joined the Union and for the next month endeavored by discussion and distribution of buttons, application cards and leaflets, to obtain members therein. About Christmas of the same year, Frank McCarty, District Director of the Union, was assigned to lead the Union's organizational drive in Petitioner's plant. He called and conducted meetings and supervised the distribution of leaflets to the Petitioner's employees.

John Canning, an employee in the vein pumping department, testified that about December 16, 1939, Henry Wichmann, the petitioner's superintendent, approached him at his work bench and, after asking him how long he had been in the petitioner's employ and whether he could obtain a job elsewhere if the petitioner discharged him,

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[2] The Board made many findings of fact notwithstanding substantial and convincing evidence to the contrary adduced by the Petitioner, but in view of the decisions in:

N.L.R.B. v. *Nevada Consolidated Copper Corporation*, 316 U.S. 105

N.L.R.B. v. *Link Belt Co.*, 311 U.S. 584

in the following statement we summarize the facts as found by the Board and not any countervailing evidence, unless otherwise expressly indicated.

stated that there were "men walking the streets today that are laid off on account of trying to organize the union. . . . You have your rights and I have my rights and . . . this is no warning against your job . . . this is just a little friendly talk." Canning nevertheless joined the union on December 23, 1939, and about four days later began wearing his union button in the plant.

Canning was selected as the union steward in the vein pumping department. He testified, in this connection, that on the first day he wore his steward's button at the plant, James McMahon, his foreman, asked him whom he "was stewarding it over"; and that upon the following pay day McMahon said to him: "Here is your check, pin it on your button so you won't lose it because you seem to know all the answers."

Shortly after December 28th, when Ahern, an employee returned to work following a brief lay-off, McMahon (a foreman) said to him: "I hear you are organizing a union again." About the same time, McMahon reasserted his previously expressed concern about the Union by inquiring of Boland, another employee, how strong the Union was and chiding him when he replied that he did not know.

On or about January 9, 1940, James McNally and other employees received an increase in pay. McNally testified that Michael Brennan, the plant manager, in giving him the increase, stated: "You are getting more pay now than fellows across the street, although they have a contract there." The record shows that Brennan was referring to employees at the Agar Packing Company plant located across the street. That company had a collective bargaining agreement with the Packinghouse Workers Organizing Committee.

On January 14, 1940, Moriarity spoke to his fellow employee, Kirby, about the Union. Kirby reported the in-

cident to Wichmann, whereupon Wichmann summoned Moriarity to the petitioner's office. In addition to Moriarity, Wichmann and Brennan, Perry, the petitioner's vice president and McLeod, the petitioner's Canadian general superintendent, were also present. McLeod stated that he was surprised that there were disturbances in the plant, and that "We never have any trouble in any of our houses about union activities." Moriarity replied "Well, this house is different, here you have unions in all of the houses around you."

Perry thereupon remarked, "I don't think the fellows would go for a union here . . ., on account of the dues."

The Board found that the Respondent, by the foregoing acts and conduct, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. The Notice Forbidding Solicitation.

On January 6, 1940, the petitioner posted in its plant a notice prohibiting "the solicitation on company premises for membership in or for the purposes of collecting dues for any labor organization" and warning employees that "violators will be subject to dismissal" (B. Ex. 3; B.A. 318).

The petitioner contended that the reason for the rule was to maintain production and proper discipline. The Board found that although there was union activity and discussion in the plant, that it did not, as distinguished from other types of activity materially impair production or discipline (B.A. 327); neither did the rule prohibit discussion (B.A. 328). The Board further found that the posted rule forbade only union solicitation and that petitioner had in fact permitted other forms of solicitation at the plant. Thus, petitioner had not objected to solicitation for members in a good fellowship club, and had con-

sented to solicitation of employees in behalf of an insurance company on the premises (B.A. 327-328).[A]

The Board found that the petitioner posted the notice and enforced the rule therein contained in order to defeat the union membership drive and thus interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act (B.A. 329).

3. Alleged Discrimination in Discharges.

The Board found in the case of John Canning (B. A. 334) the petitioner claimed that the discharge was due to inefficiency in his work. The Board made no finding that he was not inefficient, but held that nevertheless the ground assigned by the petitioner was merely a pretext for covering up a discharge for Union activity, but the Court of Appeals stated:

> "There seems to be no question but that Canning had not properly performed his work."[B]

Nevertheless, the Court upheld the Board with respect to this discharge.

With respect to James McNally, the Board found (B. A. 330), petitioner discharged him for allegedly violating the rule which forbade solicitation of membership (B. A. 318), but held the rule discriminatory and his discharge for advocacy of the Union. The evidence is undisputed that McNally did repeatedly violate the rule and was discharged as a disciplinary measure only after being warned against further violations (B.A. 150, 151, 140 and 156).

The Trial Examiner in the Intermediate Report also recommended that an employee, Clarence Balda, a union member, be reinstated because his discharge was discrim-

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[A] This occurred in 1938, eighteen months prior to union campaign (B.A. 146, 148).

[B] Canning admitted his inefficiency was not casual and a violation of express instructions (R. A. 224).

inatory (B.A. 49). The Board, however, found with respect to said employee, (although the evidence showed he was guilty of substantially the same offense as John Canning (B.A. 336) namely, the failure to inject a proper amount of "pickle", the only difference being that Balda was required to but failed to use a calculator and Canning did not have a measuring device), that the discharge was not for union activity or membership, and dismissed the complaint with reference to him (B.A. 337).

With reference to the discharges of Canning and McNally, the Court of Appeals said in its opinion (135 Fed. (2), p. 182):

> "The evidence supporting these two cases is so fine as to approach the last limit between evidence and no evidence. A fair-minded person might well conclude that the Board was prejudiced in its action as counsel for the respondents seems to think. We have no power to review the Board's decision because it may seem to be prejudiced. We do think that the Board's decision in this case has reached the limit to which a court might go to sustain it."

BASIS OF JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked under:

(a) 239 and 240 of the Judicial Code, as amended on February 13, 1925 (U.S.C. Title 28, Sec. 346 and 347);

(b) Sec. 10(e) of the National Labor Relations Act (49 Stat. 449);

(c) The decree sought to be reviewed was entered by the Circuit Court of Appeals, of the Seventh Circuit on June 7, 1943. The opinion is reported in 135 Fed. (2d) 179.

QUESTIONS PRESENTED.

(1) Is the employer's constitutional right of freedom of speech and right to employ and discharge its employees completely restricted during a union organization campaign, so as to make any act done or thing said by him during such campaign an unfair labor practice within the meaning of Sections 7 and 8 (1) of the National Labor Relations Act?

(2) Do the acts and conduct of the petitioner in this case constitute unfair labor practices within the meaning of Sections 7 and 8 of the Act?

(3) Is a finding by the Board that an employee has been discharged for union activity or membership supported by substantial evidence, when the sole basis for such finding is such union membership or activity as against the admitted fact that the employer had *bona fide* cause for discharging the employee on other grounds?

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI.

1. The broad definition by the Court of Appeals of what is sufficient to constitute a violation of Section 8(1) gives no effect to the right of free speech of the employer, and is in direct conflict with the decision of this Court in *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, and with the reasoning of this Court in the cases of *Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S. 106; *Cantwell* v. *State of Connecticut*, 310 U. S. 296; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287; *American Federation of Labor* v. *Swing*, 312 U. S. 321. It is also in conflict with the decisions of other Circuit Courts of Appeal.

N. L. R. B. v. *American Tube Bending Co.*, 134 Fed. (2d) 993, 995.

N. L. R. B. v. *Ford Motor Co.*, 114 Fed. (2d) 905; C. C. A. 6.

Midland Steel Products Co. v. *N. L. R. B.*, 113 Fed. (2d) 800; C. C. A. 6.

N. L. R. B. v. *Union Pacific Stages, Inc.*, 99 Fed. (2d) 153; C. C. A. 9.

Humble Oil & Refining Co. v. *N. L. R. B.*, 113 Fed. (2d) 85, 89; C. C. A. 5.

A clear-cut decision by this Court on the proper construction of the words "interfere, restrain or coerce" used in Section 8 (1) of the Act with reference to the constitutional right of freedom of speech is of vital importance.

(2) The Court of Appeals has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal with respect to the question as to the burden of proof on discharges for alleged union activity. The Court of Appeals expressly found that there was no question that Canning had not properly performed his work, yet held that the mere fact of union membership and activity on the part of such employee was substantial evidence sufficient to support a finding by the Board of a discriminatory discharge.

The courts of appeal in other circuits have decided this question to the contrary, holding that against a showing of other *bona fide* cause for discharge, the mere fact of union membership or activity on the part of the employee, was not sufficient evidence to satisfy the burden of the Board that the discharge was discriminatory.

N. L. R. B. v. *Sun Shipbuilding & Drydock Co.*, (3d Cir.) 135 Fed. (2d) 15.

Martel Mills Corporation v. *N. L. R. B.*, (4th Cir.) 114 Fed. (2d) 624.

N. L. R. B. v. *Williamson Dickie Mfg. Co.*, (5th Cir.) 130 Fed. (2d) 260.

N. L. R. B. v. *Goodyear Tire & Rubber Co. of Alabama,* (5th Cir.) 129 Fed. (2d) 661.

N. L. R. B. v. *Riverside Mfg. Co.* (5th Cir.) 119 Fed. (2d) 302.

N. L. R. B. v. *Tex-O-Kan Mills Co.,* (5th Cir.) 122 Fed. (2d) 433.

Stonewall Cotton Mills, Inc. v. *N. L. R. B.,* (5th Cir.) 129 Fed. (2d) 629.

Dannen Grain & Milling Co. v. *N. L. R. B.* (8th Cir.) 130 Fed. (2d) 321.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Court, to the end that this cause may be reviewed and determined by this Court, and that the said decree of the United States Circuit Court of Appeals, for the Seventh Circuit, may be reversed and the order of the said National Labor Relations Board entered December 15, 1941, be not enforced against your petitioner, and that your petitioner be granted such other and further relief as may be proper.

Respectfully submitted,

WILLIAM DAVIES CO., INC.,
Petitioner.

By LEWIS F. JACOBSON,
DAVID SILBERT,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

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No. .....

WILLIAM DAVIES CO., INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

THE OPINION BELOW.

The opinion of the Court below is reported in 135 Fed. (2d) page 179, and is also part of the proceedings certified to this Court. The findings of fact and conclusions of law and order of the National Labor Relations Board appears at B.A. 319-340.

STATEMENT OF JURISDICTION.

A statement of the grounds upon which the jurisdiction of the Court is invoked appears in the foregoing petition for certiorari.

STATEMENT OF THE CASE.

The important facts necessary to an understanding of the issues argued in this brief are set forth in the foregoing petition for writ of certiorari under the heading "Summary Statement of the Matter Involved," and the statement therein contained is hereby made a part hereof.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred:

(a) In holding that the acts and conduct of the petitioner, as found by the National Labor Relations Board, were sufficient to constitute unfair labor practices within the meaning of Section 8 (1) of the Act.

(b) In holding that the petitioner discriminated in regard to hire and tenure of employment of James McNally and John Canning, thereby engaging in unfair labor practices within the meaning of Section 8 (3) of the Act.

(c) In directing the petitioner to offer to James McNally and John Canning immediate and full reinstatement to their former or substantially equivalent positions, and to make whole said employees from any loss of pay they had suffered by reason of petitioner's said alleged discrimination.

(d) In enforcing the order of the National Labor Relations Board and in not denying the enforcement thereof.

ARGUMENT.

I.

An employer has the constitutional right to express his opinion to his employees on the subject of unions and union membership.

The Circuit Court's opinion definitely limits any intrusion by the employer into a union organization campaign. This completely overlooks the effect of the decision of this Court in *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469. This Court there made it clear that the employer has the right to express its views on labor policies or problems and the penalty is not imposed because of any utterance which it has made; that the sanctions of the act are imposed not in punishment of the employer, but for the protection of the employees, but the employer is free to take any side it may choose on this controversial issue.

In *N. L. R. B.* v. *American Tube Bending Co.*, 134 Fed. (2d) 993, the Court in referring to the *Virginia Electric* case said at page 995:

> "If there was a basis for finding that such a presentation of the employer's side might be a covert threat to recalcitrants, there was as much basis in the *Virginia* case. If on the other hand the employer's interest in free speech in the *Virginia* case was thought to outweigh an actual prejudice to the employee's right of collective bargaining, the employer's interest is the same in the case at bar and the employees' prejudice no greater."

In *N. L. R. B.* v. *Ford Motor Co.*, 114 Fed. (2d) 905 (C. C. A. 6) the Circuit Court of Appeals for the Sixth Circuit definitely held that nowhere in the National Labor Relations Act is there sanction for an invasion of the liberties guaranteed to all citizens by the First Amendment and cited the following language in the case of *Thornhill* v. *Alabama*, 310 U. S. 88, 102:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. Citing *Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *State of New Jersey, supra.* * * *."

In *National Labor Relations Board* v. *Union Pacific Stages, Inc.*, 99 Fed. (2d) 153 (C. C. A. 9) the Court said at page 178:

> "It is difficult to think that Congress intended to forbid an employer from expressing a general opinion that an employee would find it more to his advantage not to belong to a union. Had Congress attempted so to do it would be in violation of the First Amendment, U. S. C. A. Const. Amend. 1."

So also in the case of *Humble Oil & Refining Co.* v. *National Labor Relations Board*, 113 Fed. (2d) 85 (C. C. A. 5), the Court said at page 89:

> "We do not think that the law any more than common sense, would require the employer to stand as a sheep before his shearers dumb, not opening his mouth. The right of free speech touching his own interests was involved."

II.

The acts and conduct of the petitioner in this case do not constitute unfair labor practices within the meaning of Sections 7 and 8 of the Act.

The Circuit Court indicated that it did not consider the acts committed by the Petitioner numerous or particularly flagrant, but felt that it was bound by the rule that the employer could not intrude himself in any way into the picture.

The facts found by the Board and referred to in the Court's opinion are trifling and inconsequential and were more in the nature of badinage than anything else, and without any natural tendency to interfere with, coerce or restrain, and they are wholly unworthy of the dignity with which the opinion of the Court and the findings of the Board invest them.

That they were not coercive in fact is indicated by the Union claim that the plant was approximately 100% organized (R.A. 90).

The Board placed great emphasis on the fact that the publication of notice of non-solicitation for union membership was an interference, especially because it referred to solicitation on behalf of unionization only.

The notice is addressed to employees only, and it appears from the statement therein that violators would be discharged (Ex. 3; B.A. 318). The Company could not very well threaten discharge of an apple vendor for soliciting employees to purchase apples. There was no need to post any notice as to them. There was no other rival union engaging at any time in such solicitation, and no solicitation was being or had been indulged in against the union then active. Hence there was no discrimination. There was no occasion to refer to non-existent activities.

Under the circumstances mention of solicitation for unionization only signifies nothing.

In *Midland Steel Products* v. *National Labor Relations Board,* 113 Fed. (2) 800 (6th Cir.), the Court in passing upon a notice against solicitation and a discharge predicated upon a violation of the rule, stated:

> "We think the rule is clearly reasonable. The employer has the right on his premises to demand the single minded attention of the employee to his work. In modern industry the performance of work with efficiency and without physical danger depends not only upon the devotion of the employees to their work, but also upon the amity with which they cooperate. The right of the employer to make reasonable rules for the safety and efficiency of the work includes his right to make such rules for the entire time that the working force is on the employer's premises. Solicitation, argument, the hurling of epithets, intense discussion before work has been commenced, or in the noon hour, may reasonably be expected to carry over into work hours."

The Union recognized the reasonableness of the rule by instructing their workers not to solicit on the job (R.A. 92).

The only other facts found by the Board which remotely can be construed as unfair labor practices are the discharges for alleged union activity.

As to two of these only did the Court find that there was substantial evidence. As to those two the Court was in error in finding that there was sufficient evidence. In any event, assuming that said last two mentioned discharges were not based on union activity, as we expect to demonstrate under Point III of this Argument, there is nothing in any of the facts found by the Board which either individually or collectively amounts to interference, coercion or restraint.

In determining whether the acts complained of were violative of Section 8 of the Act, the Circuit Court completely disregarded the significance of the lack of anti-union background of the petitioner. This anti-union background has been heavily stressed by this Court.

International Association of Machinists, Tool & Die Workers v. *N.L.R.B.*, 311 U. S. 72.
N.L.R.B. v. *Link Belt Co.*, 311 U. S. 588.
N.L.R.B. v. *Virginia Electric & Power Co.*, 314 U. S. 469.

In the *Virginia Electric* case, this Court did not hold that a totality of otherwise legal acts alone could support a finding of violation of the law. On the contrary, this Court emphasized that acts which might otherwise be considered lawful in themselves were proper to be considered only when there exists a wrongful background such as was present in that case, and not present in the case at bar.

The opening sentence of this court's statement of the Board's finding of fact in that case indicates our point. It is, "For years prior to the events in this case the Virginia Electric & Power Company was hostile to labor organizations" (pages 470-471).

In this case there is not a scintilla of evidence of any anti-union background. On the contrary, there is affirmative evidence that with respect to certain crafts that unions have always existed in the plant of the Petitioner. (R.A. 162), and the Circuit Court in its opinion expressly found that the company had no background of anti-union activity. The Company never refused to talk to McCarty, the organizer, when he came over (R.A. 90) or refused to bargain with him. (R.A. 90).

III.

The findings by the Board, confirmed by the Court that two employees had been discharged for union activity were not supported by substantial evidence.

The facts with respect to the discharges found by the Board and the Court below to be discriminatory are not supported by substantial evidence.

The Board impliedly admitted, and the Court expressly found that with respect to the discharge of John Canning there was no question but what Canning had not properly performed his work. The Board, however, said remarks (made to Canning two months before the discharge and before he joined the Union) by the superintendent that he knew of employees who were laid off on account of trying to organize a union,[3] and that the foreman had joked about

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[3] The testimony of the employee Canning with respect to this incident is as follows (B.A. 183; Rec. 1014):

"The Witness: No, I said a week before I joined the Union Mr. Wichmann approached me at the bench. We had a little conversation and he mentioned the fact about there is men walking the streets today that are laid off on account of trying to organize the Union.

Q. That was before you had anything to do with the Union, was it?

A. That is right.

Q. That was before there was any Union activity in the plant wasn't it?

A. Well, there was rumors going around then about there was fellows joined the Union. I didn't belong to the Union as that time and I just heard rumors a couple of times that fellows were going to start organizing the Union.

Q. And did he speak to the whole department?

A.. No, just me individually.

Q. Up in the pumping department?

A. That is correct.

(Footnote 3 continued on page 20.)

Canning's stewardship were sufficient evidence that the discharge which would otherwise be proper because based on inefficiency of the employee became discriminatory. This also in the face of a finding by the Board with respect to the employee, Balda, upon almost exactly similar circumstances with respect to the cause of discharge, that it was not discriminatory but for cause, although Balda had also joined the union (B.A. 336 and 337).

There is nothing in the record to base the finding that Canning was discharged for union activity, except the Board's suspicion in view of his union activity.

(Footnote 3 continued from page 19.)

Q. And did he say anything to you besides what you just told me?

A. Well, he asked me how long I worked there and I told him, and he asked me if I had any place that I knowed that anyone would give me a job if I lost out at Davies, and I said I don't know. And he mentioned the fact I told you about places losing out, but he says 'You have your rights and I have my rights and' he said 'this is no warning against your job' he said 'this is just a little friendly talk.'

Q. In other words, he told you, and you knew that you had your rights to do whatever you wanted to about joining the Union?

A. That is right.

Q. And Mr. Wichmann impressed that point on you at that time, didn't he?

A. That is right.

Q. And he also impressed on you the point that he was not trying to convince you one way or the other, just a little friendly discussion?

A. That is right."

and also R.A. 104; Rec. 1062:

"Q. At that conversation Mr. Wichmann told you that you had a right to join the union or do anything you wanted to about union, didn't he?

A. That is a fact."

and Canning evidently was not coerced, because he joined the Union a week after that conversation (B.A. 183; Rec. 1014).

In upholding the action of the Board with respect to the discharge of McNally, the Court holds that McNally was not discharged for violation of the non-solicitation rule because his proven activities included no words of solicitation and accordingly were not within the inhibition of the rule. This places entirely too narrow a limit upon the word "solicitation" when used in this connection. Statements calculated to persuade or encourage constitute solicitation as unmistakenly as does an entreaty.

It is clear from the record that the reason for the discharge of McNally was that he had repeatedly violated a definite rule established by the company, the scope and extent of which he clearly understood after being warned against such violation.[4]

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[4] On January 8, 1940 (2 weeks before he was discharged) the following colloquy took place between McNally and the superintendent of the plant, as shown by the testimony of McNally (B.A. 150):

"A. Well, he said he had two complaints, 'I have had two fellows complain that you have bothered them about the union, about joining the union.'

As far as I can remember now, that is just about what he stated.

Q. What did you say?

A. I said I didn't bother anybody. I didn't talk union to anybody during working hours."

And then again at B.A. 151:

"Q. Then what did he say to you in reference to your future activity?

A. Well, he asked me, he said 'Don't you know you are not supposed to talk union on the premises or during working hours?'

I said, 'I know that, but I haven't been doing it. But I can talk to them outside of working hours.'

He said, 'We don't want any of this. This is private property. You have no business talking union,' or something to that effect.

Q. And he also told you that whether you agreed with the rule or not, the company's rule was that they

(Footnote 4 continued on page 22.)

As clearly disclosed by the opinion (page 182) the Circuit Court was very doubtful whether the evidence supporting the finding of discrimination in these two cases of discharge was sufficient, but erroneously assumed it was required to uphold the Board in its finding. The court overlooked the fact that there was no evidence to sustain the Board's findings. Eliminating the mere conjecture of the Board there is none. When we have facing us a finding that the employee was inefficient, and that another employee discharged about the same time for the same type of inefficiency, was held by the Board to be properly discharged (Balda, B.A. 337), we have a clear case of failure of any evidence to substantiate the finding of discrimination.

(Footnote 4 continued from page 21.)

didn't want any talking on the company's premises, is that right, or words to that effect?

A. Yes, I believe he said something like that.

Q. And that he was merely taking this occasion to remind you of the rule, and to warn you against violating it in the future?

A. Well, I don't know what words he used, but he let me know he was warning me about it anyway.

Q. You understood at the time that the purpose of this discussion was to remind you of the rule, and warn you not to violate it in the future?

A. Yes."

Nothwithstanding this warning, he again violated this rule on January 22nd, at which time he was discharged (B.A. 140).

McNally also testified (B.A. 156):

"Q. Do you remember Mr. Brennan stating that, 'We must have respect for our rules, and men who violate them must be disciplined, and the discharge of McNally is a disciplinary measure'?

A. Yes, sir, I believe he made that statement."

The Union instructed their workers not to solicit on the job (R.A. 92).

The cases heretofore decided by this Court

N.L.R.B. v. *Nevada Consolidated Copper Corporation*, 316 U. S. 105,
N.L.R.B. v. *Link Belt Co.*, 311 U. S. 584,
N.L.R.B. v. *Automotive Maintenance Co.*, 315 U. S. 282,

are all cases where this court found that the inferences from the *evidence* were for the Board, but in each of those cases the evidence was conflicting. In the case at bar there is no conflict in the evidence that

(1) Canning was inefficient, and deliberately so;
(2) that his discharge was predicated upon such inefficiency;

or that

McNally intentionally violated a disciplinary rule promulgated by the employer in good faith and that his discharge was predicated upon such violation after explicit warning.

The only question is whether the suspicion of the Board based on their union membership or activity is sufficient to overcome the positive and uncontradicted evidence that they were discharged for proper cause.

It therefore becomes a question of law as to whether such suspicion is substantial evidence as against the direct evidence to the contrary.

In *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, at 299, this Court said:

"Substantial evidence is more than a scintilla and must do more than create a suspicion of the existence of the fact to be established."

and in *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, this Court analyzed the evidence and demonstrated that all that there was to support the Court's find-

ings were mere suspicions and hearsay evidence which could not be the basis of a finding of substantial evidence.

The Circuit Courts of Appeal of other jurisdictions have uniformly held that the burden of proof was on the Board to show that the discharge was for union activity and the mere fact of such activity was not sufficient to overcome the positive evidence of other *bona fide* cause for discharge given by the employer.

N.L.R.B. v. *Sun Shipbuilding & Drydock Co.* (3d Cir.), 135 Fed. (2d) 15.

Martel Mills Corporation v. *N.L.R.B.* (4th Cir.), 114 Fed. (2d) 624.

N.L.R.B. v. *Williamson Dickie Mfg. Co.* (5th Cir.), 130 Fed. (2d) 260.

N.L.R.B. v. *Goodyear Tire & Rubber Co. of Alabama* (5th Cir.), 129 Fed. (2d) 661.

N.L.R.B. v. *Riverside Mfg. Co.* (5th Cir.), 119 Fed. (2d) 302.

N.L.R.B. v. *Tex-O-Kan Mills Co.* (5th Cir.), 122 Fed. (2d) 433.

Stonewall Cotton Mills, Inc. v. *N.L.R.B.* (5th Cir.), 129 Fed. (2d) 629.

Dannen Grain & Milling Co. v. *N.L.R.B.* (8th Cir.), 130 Fed. (2d) 321.

In *N.L.R.B.* v. *Williamson Dickie Mfg. Co.*, 130 Fed. (2d) 260, in discussing the question of the necessary evidence to support a finding of discrimination the court said at page 262:

> "Because of the highly explosive character of the controversies arising under the National Labor Relations Act and its enforcement, there has been much looseness and confusion of thought in its enforcement and language not only as to the meaning and effect of the section of the statute in question here, defining and prohibiting the unfair labor practice of discrimi-

natory discharging, to encourage or discourage union membership, but also as to the function of the Board as champion not only against discriminatory discharges but against discharges for cause of any members of a union whose cause, as accuser, the Board has actively espoused. The result has been an interpretation of the statute not only in union pronouncements but by employees and agents of the Board and sometimes as here, an application of it by Examiner, and Board, as a barrier not against discriminatory discharges of union men but against any discharge for a cause not deemed sufficient by Examiner or Board. Because this is so, we think it well to here restate the principles controlling the decision of this case before making their application to its facts."

The Court then cited the following language from the case of *N.L.R.B.* v. *Riverside Mfg. Co.*, 119 Fed. (2d) 302, at page 305:

"The only facts found which at all tend to support the Board's conclusion that he was discharged for union activity are that he was a member of the union, and the management did not like the union or his belonging to it and had said so. If real grounds for discharging him had not been shown, or if he had been discharged for trivial or fanciful reasons, these facts would have supported an inference that he was discharged for union activity, but when the real facts of the discharge appear, these facts are stripped entirely of probative force. For it is settled by the decisions that membership in a union is not a guarantee against discharge, and that when real grounds for discharge exist, the management may not be prevented, because of union membership, from discharging for them."

And again at page 264:

"That the statute does not make the Board either 'guardian or ruler' over employees of employer; it

does not authorize it to substitute its judgment for that of the employer as to what is sufficient cause for discharge. It empowers it only, to deliver the employees from acts and restraints forbidden by the statute, and to reinstate them when they have been discriminatorily discharged."

The foregoing epitomizes the opinions of the various Circuit Courts of Appeal on the limit of the Board's right to draw inferences, and is peculiarly applicable to the facts here. Obviously, the Circuit Court of Appeals in the case at bar did not apply the same tests in determining the sufficiency of the evidence to support the Board's order.

CONCLUSION.

It is respectfully submitted that the effect of the Circuit Court's decision is to prevent the employer, during a period of union organization, from exercising its right of free speech and, its right to discharge an employee for cause. This Court should clearly enunciate principles of law which clarify and reiterate these rights as so clarified.

Respectfully submitted,

LEWIS F. JACOBSON,
DAVID SILBERT,
Counsel for Petitioner.

INDEX

CASES CITED

STATUTES

552398—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 319

WILLIAM DAVIES CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (S. R. 233–240)[1] is reported in 135 F. (2d) 179. The findings of fact, conclusions of law, and order of the National Labor Relations Board (B. A. 319–340) are reported in 37 N. L. R. B. 631.

[1] The appendices filed by the Board and the company in the court below are referred to as "B. A." and "R. A.", respectively. The supplemental proceedings in the court below have been bound into the company's appendix (pp. 233–245) and are referred to as "S. R."

JURISDICTION

The decree of the court below (S. R. 242–244) was entered on June 7, 1943. A petition for rehearing filed by petitioner (S. R. 241) was denied on May 20, 1943 (S. R. 241). The petition for a writ of certiorari was filed on September 3, 1943.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence supporting findings of the Board, which were sustained by the court below, that petitioner by various anti-union statements, by prohibition of all talk of the union among its employees on company property, and by the discriminatory discharge of two employees, engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act.

2. Whether the Board's order abridges petitioner's freedom of speech in violation of the First Amendment.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 13–14.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (B. A. 319–340). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

About the middle of December 1939, within a few days of the initiation of union activity in its plant, petitioner's production superintendent, Henry Wichmann, warned employee John Canning that "there are men walking the streets today that are laid off on account of trying to organize a union" (B. A. 322; 82, 181, 183, 197–198). Shortly thereafter, Foreman McMahon, questioned employee Paul Ahern as to the identity of the individual who "started the Union" in the plant, accused Ahern himself of "organizing the union," and questioned employee John Boland concerning the Union's strength (B. A. 323; 166–168). Early in January 1940, while the union membership campaign was in progress, General Manager Brennan, upon granting a promised wage increase to employee James McNally, the union shop steward in the smokehouse, pointed out to McNally that he was now receiving higher wages than "the fellows across the street although they have a contract there"

[2] In the following Statement, the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

(B. A. 323; 138–139). At about this time Michael Moriarity, an ordinary laborer in the plant, when accused of soliciting union membership on company time, was summoned before petitioner's top-ranking plant officials, together with petitioner's superintendent of production in Canada, and questioned for over an hour concerning his views on unions and his part in the organizational activity in the plant: he was asked about the "difficulty" in the plant; was informed that petitioner did not believe its employees would "go for a union because of the dues"; was accused of being "the head organizer here," and of distributing leaflets; when he denied the charges he was interrogated as to the identity of the union leaders (B. A. 323–324; 90–91, 123, 126–127).

On January 6, petitioner posted a notice in its plant forbidding "solicitation for membership in or collection of dues for a labor association" on its premises, on pain of dismissal (B. A. 325; 318). This notice prohibited only union solicitation, permitting, as in the past, solicitation for projects of which petitioner approved (B. A. 327–328; 57–58, 145, 233). Furthermore, although specifically limited to solicitation and the collection of dues, petitioner interpreted it to prohibit even casual mention of the Union among union members (B. A. 328; 266, 272, 138, 139–140), even though conversation on a variety of other subjects had always been and continued to be permitted in the plant (B. A. 328; 60, 97–98, 133, 208). Peti-

tioner's contention at the hearing that the notice was necessitated by an alarming drop in production caused by widespread unrest, due to union activity in the plant, was not supported by the record. The "alarming drop in production" occurred in only one department, and for only a few days before the notice was posted; it occurred at a time when there were production difficulties in other departments and admittedly could have been caused by a number of factors totally unrelated to the union activity (B. A. 327; 238–244). Petitioner had made no investigation to determine the real cause of the drop in production, but merely assumed it was due to union activity, although at the time it had not actually witnessed any instance of union solicitation (B. A. 325–327; 246, 268, 299–300). Petitioner stated that the "unrest" in the plant was due to arguments taking place among the employees (B. A. 326; 240). It appeared, however, that there was always a great deal of argument in the plant on various topics, such as politics, religion, and sports, that such argument was freely permitted, and that in the instant case petitioner had no first-hand knowledge, with the exception of one remark overheard by one of its supervisors, as to what the arguments were about (B. A. 326; 245–246, 258–260, 283–284, 298–299).

The Board found that petitioner, by the foregoing statements and activities, interfered with, restrained, and coerced its employees in the exer-

cise of the rights guaranteed in Section 7, thereby violating Section 8 (1) of the Act (B. A. 328–329, 339).

The Board found further (B. A. 331, 336, 338) that petitioner violated Sections 8 (3) and (1), in that it discriminatorily discharged James McNally on January 22, 1940, and John Canning on January 29, 1940, because of their union membership and activity.

McNally was union steward in petitioner's smokehouse (B. A. 329; 136–137, 141–142) and was active in the organizational activity in the plant. Two days after the posting of the notice prohibiting union solicitation, he was warned by Superintendent Wichmann not to "talk unionism" even in his free time (B. A. 329; 138); and when he was granted a promised wage increase early in January, Plant Manager Brennan reminded him pointedly that he was now receiving more pay than "the boys across the street" who were operating under a union contract (B. A. 330; 138–139).

On the morning of January 22, as McNally, in the course of his duties, happened to pass the workbench of employee Stevens, he noticed that Stevens, a union member, was not wearing his union button. He asked him where it was. Stevens replied that it was in his pocket. McNally thereupon remarked that that was "a hell of a place to have it" and went on about his business (B. A. 330; 139–140). The entire episode took only a few seconds. It was witnessed by Manager Bren-

nan, who immediately questioned Stevens and then summoned McNally to Wichmann's office. In Brennan's presence, Wichmann reminded McNally that he had warned him on two previous occasions about "talking union" during working hours, and peremptorily discharged him on the ground of bothering and interfering with other employees (B. A. 330; 140–141, 250–251). Petitioner subsequently stated that McNally was discharged because he had "broken a company rule" and that the discharge was "a disciplinary measure" (B. A. 330; 156–157, 272). The notice of January 6, however, was specifically limited to "union solicitation and the collection of dues," activities in which McNally was not engaged. There was no rule against general conversation in the plant, and in the past employees had not been disciplined for participating in conversation upon a wide variety of topics (B. A. 328; 60, 97–98, 133, 208).

Canning was union steward in the vein pumping department and was active in the union organizational activity in the plant. Even before he joined the Union, petitioner warned him that "men are walking the streets because of trying to organize a union" and later commented sarcastically on his union stewardship (B. A. 334; 172–173, 183, 197–198). On January 29, Canning failed to insert a sufficient amount of pickle into the butt end of a ham (B. A. 334–335; 173). He was immediately and summarily discharged (B. A. 335; 292) despite the fact that this was the first occasion

petitioner had to complain about Canning's work in his 15 months' employment (B. A. 179), and that Canning explained that he had stopped pumping pickle because he thought the vein was about to rupture (B. A. 335; 175, 187, 292, 176–177). After his discharge, petitioner accused Canning of responsibility for spoiling three other hams (B. A. 335; 177) and inquired whether Canning had a grievance against the company, hinting that it considered him guilty of sabotage (B. A. 335; 176, 190–191). Petitioner introduced no evidence whatever to show that spoilage of these three hams could in any way be attributed to Canning. Still later, at the hearing, petitioner accused Canning of being a "cut-up" (B. A. 335; 224), a matter not previously mentioned.

Upon the foregoing findings, the Board ordered petitioner to cease and desist from discouraging membership in the Union or any other labor organization of its employees by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to the hire and tenure of employment, or any term or condition of employment of its employees; to cease and desist from in any manner interfering with, restraining or coercing its employees in the exercise of the right of self-organization; to offer to McNally and to Canning immediate and full reinstatement to their former (or substantially equivalent) positions, without prejudice to their seniority and other rights and privileges; to make

McNally and Canning whole for any loss caused them by petitioner's discrimination against them by awarding them back pay; and to post appropriate notices (B. A. 339–340).

On September 28, 1942, the Board filed in the court below a petition to enforce the Board's order (B. A. 1–4). On June 7, 1943, the court entered a decree (S. R. 242–244), enforcing the Board's order except for modifications not here in issue.

ARGUMENT

1. Aside from petitioner's attempt to find a free-speech issue in the case, its petition for certiorari presents only the issue of the substantiality of the evidence supporting the Board's findings (Pet. 9–10, 13, 16–26). This issue presents no question of general importance. Moreover, the facts found by the Board and summarized in the Statement, *supra*, pp. 3-8, furnish ample support for the challenged findings, as the court below held (S. R. 236–237). The cases cited as presenting an alleged conflict (Pet. 10–11, 17–18, 23–26) turn upon their own facts. The decision in *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105, forecloses petitioner's contention (Pet. 23–26) that the Board may not properly find that an unfair labor practice has been committed where the record contains evidence which would also support a contrary finding.

2. The case presents no free-speech issue since every provision of the Board's order is fully supported by the finding that petitioner discriminatorily discharged two employees. Nor is there merit to petitioner's contention (Pet. 9, 14–15) that its statements about the Union and its inquiries concerning the identity of union members by its supervisors and officials (*supra*, pp. 3–5) constitute an exercise of the right of free speech and expression protected by the First Amendment. This contention depends upon an issue of fact, *i. e.*, whether the statements and inquiries may fairly be considered to have constituted interference with, coercion, or restraint of the rights guaranteed to petitioner's employees by Section 7 of the Act. The right of free speech does not include the right to coerce employees through speech or otherwise. *National Labor Relations Board* v. *Virginia Electric and Power Company*, 314 U. S. 469, 477. The statement of Plant Superintendent Wichmann that "there are men walking the streets today that are laid off on account of trying to organize a Union" was clearly coercive and was recognized as such by its recipient (*supra*, p. 3; see also B. A. 334; 200). The elaborate interview of petitioner's officials with Moriarity, an ordinary laborer in the plant, in which the officials probed into the internal affairs of the Union and accused Moriarity of being "the head organizer" and of passing out Union literature, together with other

inquiries concerning the Union's organizational structure, the pointed suggestion that petitioner's employees without a union were better paid than other employees operating under a union contract, and the posting of the discriminatory notice forbidding union solicitation on plant premises cannot be deemed merely the innocent expression of petitioner's opinion. Such statements and actions were intrinsically coercive, made for the purpose of restraining the employees' adherence to the Union and coercing their judgment in respect to it. They were not, as petitioner asserts, trifling, inconsequential, and of no significance. They constituted, as the Board found upon the whole record, an attempt to defeat the union membership drive, and interference with rights guaranteed by the Act (B. A. 324–325, 328–329). The court below expressly concurred in this finding (S. R. 236).

Nor is there a conflict, as petitioner asserts (Pet. 9–10, 14–17), with various cases cited from other circuit courts of appeals. None of those cases holds that statements of an employer which are coercive or intimidatory are protected by the First Amendment; on the contrary, in each of them the court recognized that communications which may reasonably be said to coerce employees are outside the range of constitutional protection. The inquiry in each case was directed to the question whether the Board's findings that the statements were coercive was supported by substantial

evidence. Those cases turned, as does the present one, upon their particular facts.

CONCLUSION

The decision below sustaining the Board's findings and order is correct and presents neither a conflict of decisions nor any question of general importance. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

ROBERT B. WATTS,
General Counsel,

RUTH WEYAND,
MARGARET M. FARMER,
Attorneys,
National Labor Relations Board.

SEPTEMBER 1943.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. sec. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.
>
> * * * * *
>
> SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.
>
> * * * * *
>
> SEC. 10. (c) * * * If upon all the testimony taken the Board shall be of the

opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1943

No. 8123

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WILLIAM DAVIES CO. INC.,
Respondent.

Petition for Rehearing.

LEWIS F. JACOBSON,
SIDNEY C. NIERMAN,
DAVID SILBERT,
33 North LaSalle Street,
Chicago, Illinois,
Attorneys for Respondent.

JACOBSON, MERRICK, NIERMAN & SILBERT,
Of Counsel.

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Petition for Rehearing.

MAY IT PLEASE THE COURT:

Respondent respectfully requests a rehearing.

I.

The Court has sustained findings by the Board without any evidence to support such findings.

Anti-Union Activities.

On the subject of anti-union activities, the Court, on pages 2 and 3 of its opinion, makes certain references to alleged statements by the plant superintendent and the foremen to Michael Moriarity, John Canning and Paul

Ahern, and refers to the incident of Moriarity being honored by an invitation to meet with the high officials of the Respondent, at which meeting it was stated the officials of the Respondent wished to convey to Moriarity their views about unionization and to probe Moriarity about his.

It is undisputed in the record, and the Board found that Michael Moriarity was not interfered with or coerced in connection with his union affiliations, and the complaint against Respondent in connection with its refusal to reemploy Moriarity was dismissed.

Moriarity was known to have been an active member in the union because the record is clear that he was secretary of the local and had passed out cards and leaflets concerning the union and had held at least one meeting for organization purposes.

Notwithstanding these facts, the Board found that he was not laid off because of his union activity, and the court found that he was not refused employment because of his union activities or affiliation.

As to John Canning, the statement made to him on December 16, 1939, when he was not a member, did not deter him in connection with his union affiliations because a week later he became a member of the Union. Nothing that took place at the meeting between Moriarity and the high officials of the Respondent could have amounted to interference or coercion because Moriarity testified that the subjects discussed at the meeting had to do with the operation of the plant, and that everything that was said was in a friendly spirit.

The matters complained of by the Board and referred to in the Court's opinion, are trifling and inconsequential, and were more in the nature of mere badinage than anything else, and without any natural tendency to interfere

with, coerce or influence, and they are wholly unworthy of the dignity with which the opinion invests them.

Admitting the possibility of the fabled occurrence wherein the mountain after travail brought forth a mouse, it is difficult to concede that such a mouse, after travail, could bring forth such a mountain as has been made of the mole hill this record presents.

Indeed, there seems to be some question in the mind of the Court, as witness the following passage:

> "A fair minded person might well conclude that the Board was prejudiced in its action as counsel for the respondent seems to think. We have no power to review the Board's decision because it may seem to be prejudiced. We do think that the Board's decision in this case has reached the limit to which a court might go to sustain it" (op. 5).

Apparently the court has overlooked an important distinction.

If it be conceded (which we do not concede, because the inescapable result is that respondent would be deprived of all right of review) that finding that a notice was posted and what it recited, that certain words were uttered, and by whom, and to whom, and the like, are factual and not subject to review, provided they are supported by substantial evidence; can it be possible that the functions of this Court are circumscribed within so narrow limits that it is not permitted to determine whether inferences drawn therefrom are reasonable, such as naturally result from such causes instead of from mere guesswork? We think not.

There seems to us to be a distinction between findings of fact, not to be set aside if supported by the evidence, and inferences drawn from factual findings.

We urge that inferences drawn from factual findings are reviewable as questions of law, and that they must be fairly sensible, and if they are not, the Court is not bound thereby and may substitute its own reasonable conclusions for those to be accounted for only by a vivid imagination.

Would the court say that they would have no power to review the Board's inferences if it appeared that they were reached through corrupt motives? We are not willing to believe that the Court's powers are so limited, and that it can do no more than act as a stamp of approval and merely convert a Board's order to a judicial decree.

If it is the rule that all of the Board's findings and inferences whether they be supported by evidence or not, must be approved, then we contend that the court's power to review the Board's order has been unnecessarily and improperly restricted.

In *National Labor Relations Board* v. *Falk Corp.*, 102 F. (2d) 383, cited in the opinion, the following language is quoted with approval:

> "Procedure does not go so far as to justify orders without a basis in evidence having *rational probative force.*" (italics supplied.)

It is even more important that inferences drawn from findings of fact be sane and reasonable and such as a fair minded person (to use the language of the opinion) might reach, and that such inferences are subject to review as a matter of law, and are not sanctified by any rule proscribing review of conflicting evidence as a basis for fact finding. To hold otherwise would emasculate the court of its powers and deprive it of its dignity.

This court has always treated the question as to whether there is substantial evidence to support a finding of fact by the Board as a question of law. *NLRB* v. *Boss Mfg.*

Co., 105 Fed. (2d) 574; *Jefferson Electric Company* v. *NLRB*, 102 Fed. (2d) 949.

Under the Act, all questions of law are open to consideration by the reviewing court. Likewise, by the express terms of the Act, factual findings of the Board are conclusive upon the reviewing court only if supported by evidence.

In the *Acme Evans* case,[1] although Judge Evans said that the only prerogative of the Appellate Court was to act as a "rubber stamp" to enter "orders required by the Board that its order may be enforced as a judicial decree," he also said that it was the Court's duty to ascertain whether substantial evidence supports the (Board's) finding.

In the *Aintree* case[2] Judge Kerner said that the question which the Court was asked was to determine "whether the findings are sustained by substantial evidence."

It frequently has been held that the question of the reasonableness of a notice is one of law for the court to determine (see cases cited in brief of Respondent, page 59). The same rule seems applicable as to inferences drawn from factual findings.

The rule to which the opinion subscribes is too harsh and is not found in any of the three cases cited by the Court in its support.

The opinion states (op. 3) "the slightest interference, intimidation or coercion by the employer of the employees in the rights guaranteed to the employees by the statute, constitutes an unfair labor practice in violation of Section 8(1) of the Act," citing three cases to which we shall refer and which we submit do not support or authorize so harsh a rule.

---

[1] 130 Fed. (2d) 477.
[2] 132 Fed. (2d) 469.

National Labor Relations Board v. *W. A. Jones Foundry & Machine Co.*, 123 F. (2) 552, is the first of the cases cited.

To review the findings of fact in that case would extend this petition to an improper length. It should suffice to say that there the antagonism, interference and attempted coercion was positive and extreme. Here it is not, but on the contrary, is evidenced only by mere idle chatter.

There, the AFL union was forbidden to solicit membership on the company's time, but an independent union had been permitted so to do.

Here, there is nothing of the kind.

There, while there had never been any union activity, it blossomed forth November 9, 1939, when it met a sudden response by the company, and Coleman (executive officer in charge of the company) went immediately into action.

These expressions are found in the opinion and are only some of many which establish not only a settled opposition to union activity but affirmative action which could only be calculated to interfere with and to intimidate.

Nothing of the sort here exists and the matters relied upon to show intimidation and coercion are mere trifles.

It was held that it was "clear" that the activities of the company officials were intended to and did influence the employees; that findings to that effect are sustained by substantial evidence; that the purpose of the Act was to guarantee to employees freedom of interference in their efforts to organize and to bargain collectively.

There is nothing in that opinion to support the proposition to which it is cited, namely, that the "slightest interference" constitutes an unfair labor practice here.

Here the few trifling occurrences in evidence do not in themselves import any such intention and have no such

natural consequences, and we submit there is no substantial evidence to support the unreasonable inference which the Board asks be approved.

Rapid Roller Co. v. *NLRB,* 126 F. (2) 452 is also cited in the opinion.

This also was a case in which anti-union activities were not only extreme but were clearly shown to have been intentional.

There were threats to get even with those engaged in unionizing endeavors, even if it took one year or five years to do so, and to move the plant elsewhere, where statedly freedom from labor difficulties was guaranteed.

The findings of fact as to unfair practices were sustained. It is not perceived how it could have been otherwise. There was not only substantial evidence in support but it is quite obvious that if the court had been permitted to weigh the evidence the same conclusion would have been arrived at.

However, there is nothing in the opinion to support the proposition as to slightest interference to which it is cited in the instant case.

> *National Labor Relations Board* v. *Falk Corp.,* 102 F. (2) 383.

This case, also cited in the opinion, is likewise by no means a parallel case, but is in fact one in which the company actively sponsored, promoted and organized an independent rival union.

There it was said that the employer not only has a right to his views, but that the right to entertain views is valueless if not accompanied by the right to express them.

As in the two previous cases cited in the opinion, we have here sought in vain for any expression tending to support the harsh rule of slightest interference.

However, we claim that in the instant case there was no interference. It is not a border line case. Rather is it a case wherein the opinion upholds the vivid imagination of the Board founded upon flimsy and inconsequential showing instead of a reasonable inference fairly drawn from factual findings supported by substantial evidence as distinguished from mere guesswork.

Eliminating the mere conjecture, there is no evidence in the record to support the findings.

We also submit that whether inferences drawn are sane and such as naturally flow from the occurrences, is a question of law and open to consideration by the court which we have hereinbefore discussed.

In addition to the inconsequential language, and then uttered only in surprisingly few instances, there is only the question of the posted notice.

We disagree with the stated view that the notice is an interference and an anti-union activity merely because it refers to solicitation in behalf of unionization only.

The notice is addressed to employees only as appears from the statement therein that violators will be discharged. The company could not very well threaten discharge to an apple vendor for soliciting employees to purchase apples. There was no need to post any notice as to them. The company could otherwise effectively prevent their activities if they became such as to amount to a nuisance, and there was no other rival union engaging at any time in such solicitation and no solicitation was being or had been indulged against the union then active. Hence there was no discrimination. There was no occasion to refer to non-existent activities.

It is not perceived that there can be a discrimination against one party unless there is another party who is favored. Here there is none.

The cases which have come to our notice on this point are ones in which solicitation by one union was forbidden, and at the same time solicitation by another was permitted.

Under the circumstances, mention of solicitation for unionization only, signifies nothing.

It is respectfully urged that the Court consider its views so expressed in order that it may properly consider and determine the question which Respondent has raised as to the sufficiency of the evidence to support the Board's conclusions and findings.

It is also to be observed that the notice, although condemned in this connection, is later in the opinion, held to be a proper notice as a basis for discharge of a violator. This inconsistency seems to have been overlooked.

Discharge of McNally.

The Board concluded that McNally was discharged for union activities and not for violation of the non-solicitation rule as Respondent contended.

The state of the record upon this question is briefly and fairly set out in the brief for the Respondent, commencing at page 34.

In upholding the action of the Board the opinion holds (op. 4) that McNally was not discharged for violation of the non-solicitation rule because his proven activities to bring it about that employees should join the union included no words of solicitation, and accordingly were not within the inhibition. This places entirely too narrow a limit upon the meaning of the word "solicitation" when used in this connection. It is not necessary to beg in order to solicit.

Statements calculated to persuade or to encourage constitute solicitation as unmistakably as does an entreaty.

In *Midland Steel Products Co.* v. *NLRB*, 113 F. (2) 800 (CCA 6, 1940) there was under consideration a notice forbidding solicitation on company property without approval of the management under penalty of discharge for violation, and in holding the rule to be a reasonable one, the court said, at page 805:

> "Since the rule was violated the discharge was lawful, unless the rule was unreasonable and hence null and void. The employer in his right of control over the property and the employee is authorized to make reasonable rules for the conduct of the business and the employee is bound to obey such reasonable rules as a part of his contract to hire.
>
> "Whether this rule was reasonable is a question of law for the court to determine. *Little Rock & M. Rd. Co.* v. *Barry*, 84 F. 944 (CCA 8); *Mo. K. & T. Ry. Co.* v. *Collier*, 157 F. 347 (CCA 8); *Chicago, R. I. & P. Ry. Co.* v. *Ship*, 174 F. 353 (CCA 8); *Central Rd. of N. J.* v. *Young*, 200 F. 359 (CCA 3).
>
> "We think the rule is clearly reasonable. The employer has the right on the premises to demand the single minded attention of the employee to his work. In modern industry the performance of work with efficiency and without physical danger, depends not only upon the devotion of the employees to their work but also upon the amity with which they cooperate.
>
> "The right of the employer to make reasonable rules for the safety and efficiency of the work includes his right to make such rules for the entire time that the working force is on the employer's premises. Solicitation, argument, the hurling of epithets, intense discussion before work has been commenced, or in the noon hour, may reasonably be expected to carry over into work hours."

It will be noted that the court held that the reasonableness of the rule is a question of law for the court to determine.

We submit that this view applies with equal force to the reasonableness of conclusions and inferences for which we have heretofore contended herein.

Discharge of Canning.

The opinion upholds the action of the Board with reference to the discharge of Canning, which the Board inferred was on account of union activities and not because he did his work improperly, and joked around while on the job (op. 5-6).

The remarks made to Canning are summarized in the opinion at page 2 and we think it unfair to state, as the opinion does, that the superintendent warned Canning; that is not a fair interpretation of such casual and inconsequential remarks.

The opinion states,

> "There seems to be no question but what Canning had not properly performed his work."

There is no substantial evidence in the record from which it can reasonably be inferred that the discharge of Canning was for any other reason than his proven inefficiency. An employee is not clothed with immunity from discharge for bad workmanship, merely because he is able to exhibit a card of membership in a union. Canning's work was proven and found to have been improperly performed, the opinion so states, and we submit there is no foundation for the mere conjecture that his discharge was for union activities instead of for inefficiency, as respondent established and contends.

Canning was guilty of the same inefficiencies and deficiencies in his work as was Balda, another employee who was discharged for the same cause, and whose discharge was held to have been justified by the Board. In

addition to those inefficiencies and deficiencies Canning was found by the Board to have joked around during his work. Can it be that Canning's membership in a union, together with the foreman's alleged statement a week prior to the time that Canning joined the union, immunizes him from discharge for a cause found by the Board to be otherwise sufficient? This is the effect of the court's decision.

We quote further from page 5 of the opinion:

> "The evidence supporting these two cases is so fine as to approach the last limit between evidence and no evidence. A fair minded person might well conclude that the Board was prejudiced in its action as counsel for the respondents seems to think. We have no power to review the Board's decision because it may seem to be prejudiced. We do think that the Board's decision in this case has reached the limit to which a court might go to sustain it."

In our opinion it not only has approached but has far out-distanced that limit; but however that may be, we do not understand the test to be whether the finding is supported by evidence or by no evidence, but whether there is substantial evidence in the record to sustain the finding. Eliminating the mere conjecture, we submit there is not.

We also submit that whether inferences drawn are sane, and such as naturally flow from the occurrences, is a question of law and open to consideration by the court, which we have hereinbefore discussed.

Scope of Order.

The Court failed to consider Respondent's point No. 5 of the contested issues and the opinion is silent thereon.

The Court has, without exception, refused to enforce a blanket cease and desist order such as is found in the Board's order. The general provisions of the order directing the Respondent to cease and desist from *in any*

other manner interfering with, restraining or coercing its employees in the exercise of the right to self organization, to form, join or assist labor organizations to bargain collectively through representatives of their own choosing and to engage in concerted activity for the purposes of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, is not found in the complaint and is entirely unsupported by the evidence.

CONCLUSION.

It is respectfully submitted that the opinion appears to have been reached through inadvertence and mistake; that it is unjust and unfair to respondent and is contrary to law, and that a rehearing should be allowed, the case reconsidered, and a more tenable conclusion reached.

Respectfully submitted,

LEWIS F. JACOBSON,
SIDNEY C. NIERMAN,
DAVID SILBERT,
Counsel for Respondent.